

SENATE RECORD VOTE ANALYSIS

105th Congress
2nd Session

Vote No. 277

September 18, 1998, 9:43 a.m.
Page S-10564 Temp. Record

PARTIAL-BIRTH ABORTION BAN/Veto Override

SUBJECT: Partial-Birth Abortion Ban Act of 1997 . . . H.R. 1122. Passage, upon reconsideration, the objections of the President notwithstanding.

ACTION: VETO SUSTAINED, 64-36

SYNOPSIS: On March 20, 1997, the House passed H.R. 1122, the Partial-Birth Abortion Ban Act, by a vote of 295-136. The Senate amended and passed the bill on May 27, 1997, by a vote of 64-36. The House agreed, 296-132, to the Senate amendments on October 8, 1997. President Clinton vetoed the bill on October 10, 1997. The House voted 296-132 to override the Clinton veto on July 23, 1998.

H.R. 1122, the Partial-Birth Abortion Ban Act, will enact criminal and civil penalties for knowingly performing a partial-birth abortion, unless such an abortion "is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury." The term "partial-birth abortion" will be defined as an abortion "in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery." The term "vaginally delivers a living fetus before killing the fetus" will be defined to mean deliberately and intentionally delivering into the vagina a living fetus, or a substantial portion thereof, for the purpose of performing a procedure that the person delivering the fetus knows will kill the fetus, and then killing the fetus. A person who performs such an abortion may be fined and/or imprisoned for up to 2 years. The father, if married to the mother when she has a partial-birth abortion, and the maternal grandparents, if the mother is less than 18 years of age, will be permitted to seek civil relief unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion. Such relief will include money damages for all injuries, psychological and physical, and statutory damages equal to three times the cost of the partial-birth abortion. A woman who has a partial-birth abortion will not be subject to criminal or civil prosecution. A defendant accused of performing an illegal partial-birth abortion will be allowed to seek a hearing before the applicable State medical board on whether his or her conduct was necessary to save the life of the mother due to a physical disorder, illness, or injury. A court will delay the start of a trial for 30 days on request to allow such a hearing to take place. A medical board's

(See other side)

YEAS (64)			NAYS (36)			NOT VOTING (0)	
Republicans (51 or 93%)	Democrats (13 or 29%)		Republicans (4 or 7%)	Democrats (32 or 71%)		Republicans (0)	Democrats (0)
Abraham	Hutchinson	Biden	Chafee	Akaka	Kerrey		
Allard	Hutchison	Breaux	Collins	Baucus	Kerry		
Ashcroft	Inhofe	Byrd	Jeffords	Bingaman	Kohl		
Bennett	Kempthorne	Conrad	Snowe	Boxer	Lautenberg		
Bond	Kyl	Daschle		Bryan	Levin		
Brownback	Lott	Dorgan		Bumpers	Lieberman		
Burns	Lugar	Ford		Cleland	Mikulski		
Campbell	Mack	Hollings		Dodd	Moseley-Braun		
Coats	McCain	Johnson		Durbin	Murray		
Cochran	McConnell	Landrieu		Feingold	Reed		
Coverdell	Murkowski	Leahy		Feinstein	Robb		
Craig	Nickles	Moynihan		Glenn	Rockefeller		
D'Amato	Roberts	Reid		Graham	Sarbanes		
DeWine	Roth			Harkin	Torricelli		
Domenici	Santorum			Inouye	Wellstone		
Enzi	Sessions			Kennedy	Wyden		
Faircloth	Shelby						
Frist	Smith, Bob						
Gorton	Smith, Gordon						
Gramm	Specter						
Grams	Stevens						
Grassley	Thomas						
Gregg	Thompson						
Hagel	Thurmond						
Hatch	Warner						
Helms							

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

ruling will be admissible as evidence in the trial of a defendant.

NOTE: A two-thirds majority vote of those Senators present and voting (67 in this case) is required to override a veto.

Those favoring final passage contended:

Argument 1:

Partial-birth abortions are brutal, never necessary, dangerous to women, and constitutionally can and should be banned. One by one, the lies made in support of this horrific procedure have been refuted, and as those lies have fallen the number of pro-choice Members who support this bill has increased. We now need the support of just three more Senators to override the Clinton veto. When this debate began, abortion advocacy groups lied and said that partial-birth abortions, as we described them, were never done. When that lie was exposed, they claimed that such abortions were rare. After that claim was proven false by the testimony of partial-birth abortionists themselves, supporters of this procedure tried new lies--they said that the anesthesia kills the babies or prevents them from feeling pain. Anesthesiolo-11.16 rei"W m"BTi"10.08 0 0 10.08 104.86 539.501 Tm"(p)Tj"ETi"Qi"i"-0inton veto.

SEPTEMBER 18, 1998

VOTE NO. 277

mother." The PHACT physicians also deny that fetal abnormality would ever indicate partial-birth abortion: "In some cases, when vaginal delivery is not possible, a doctor performs a Caesarian section. But in no case is it necessary to partially deliver an infant through the vagina and then kill the infant."

We are truly saddened that we even have to debate this issue with our colleagues. Whatever one's position is on abortion, one should admit the chilling inhumanity of this procedure. If Senators were to hear that the local humane society planned on destroying 100 puppies or kittens by cutting open the backs of their heads, without anesthetic, and suctioning out their brains, they would be outraged, but, because we are talking about "abortion" and human babies, many pro-choice Senators (though to their credit, not all) are in denial. This procedure is so inhumane that it would not be allowed under current Federal animal testing guidelines for laboratory rats, but some of our colleagues still support it for human babies because they are blind to the facts. They are not deliberately dishonest--it is just that their pro-choice fanaticism makes them believe obvious falsehoods despite overwhelming evidence to the contrary. Instead, they have continued to make claims that are demonstrably false.

Opponents of this bill do not like the term "partial-birth abortion," saying they do not think that it is a precise medical term. However, the definition of what is meant by this term is contained in the bill, and that definition is very specific, and it has been endorsed by the American Medical Association. No matter how much Senators may wish to cloud the issue, they and everyone else knows exactly what is meant.

Another misrepresentation that has been widely spread by bill opponents is that the anesthesia given to the mother in a partial-birth abortion kills the baby before the abortion is even performed. For instance, Mary Campbell, the medical director of Planned Parenthood, circulated a "fact" sheet claiming that anesthesia that is used is calculated by the "mother's weight, which is 50 to 100 times the weight of the fetus . . . This induces brain death in a fetus in a matter of minutes. Fetal demise therefore occurs at the beginning of the procedure while the fetus is still in the womb." Similarly, in a June 23, 1995 submission to the House Judiciary Constitution Subcommittee, the late Dr. McMahon (who admitted to performing partial-birth abortions) wrote that the anesthesia causes fetal demise. The Senate Judiciary Committee asked the American Society of Anesthesiologists if that claim had any truth to it. Dr. Norig Ellison, the president of the American Society of Anesthesiologists, responded that it had "absolutely no basis in scientific fact" and that he was deeply concerned that the widespread publicity given to it "may cause pregnant women to delay necessary and perhaps lifesaving medical procedures, totally unrelated to the birthing process, due to misinformation regarding the effect of anesthetics on the fetus." He further testified that regional anesthesia (used in many partial-birth abortions and most normal deliveries) has no effect on the fetus, and that general anesthesia has some minimal sedating effect, though it is doubtful that it provides any pain relief. Further, we know that after interviewing Drs. McMahon and Haskell (Dr. Haskell is another acknowledged partial-birth abortionist) American Medical News reported in 1993 that both had said that the "majority of fetuses aborted this way are alive until the end of the procedure."

Another claim that we have heard made is that babies at the stage of gestation at which partial-birth abortions are performed (from the 20th week through the ninth month) do not feel pain. This claim also is totally false. Professor Robert White, Director of the Division of Neurosurgery and Brain Research Laboratory at Case Western Reserve School of Medicine, testified before a House hearing that "The fetus within this time frame of gestation, 20 weeks and beyond, is fully capable of experiencing pain." On partial-birth abortions, "Without question, all of this is a dreadfully painful experience for any infant subjected to such a surgical procedure." Similarly, Dr. Harlan Giles, a professor of high-risk obstetrics and perinatology who performs abortions by a variety of procedures, had the following to say of the procedure: "In my own personal opinion, particularly when there are other techniques available, that the introduction of a sharp instrument into the brain and sucking out the brain constitutes cruel and unusual fetal punishment."

Some Senators have suggested that this bill is unconstitutional because it does not provide a health exception. A few constitutional experts agree with them. However, most of the experts testified that the bill is fully constitutional, and their arguments were more persuasive. First, the bill in no way restricts the "right" to have a third-trimester abortion. The "right" that the Supreme Court noticed emanating in the penumbra of the Constitution was never the right to terminate a pregnancy right up until the moment of birth in the cruelest, most inhumane method imaginable. Second, it is likely that this method of "abortion" in which a child is brought four-fifths of the way out of his or her mother before he or she is killed eventually will be ruled to be infanticide, not abortion. We of course do not know what various judges may decide they think the Constitution means, but if they follow the Constitution and precedents instead of their own policy agendas, they will hold this bill to be constitutional.

One of the areas on which our colleagues have been least willing to face facts is that most of these abortions that have been admitted to have been performed have been for purely "elective" reasons, meaning that both the mothers and babies have been perfectly healthy. On November 8, 1995, Dr. Haskell stated under oath in Federal District Court in Ohio that most of his partial-birth abortions: "are elective in the 20-24 week range. In my particular case, probably 20 percent are for genetic reasons and the other 80 percent are purely elective." The other acknowledged partial-birth abortionist, Dr. McMahon, told the American Medical News in 1993 and Congress in 1995 that 80 percent of the partial-birth abortions he performed were "therapeutic." He then submitted a self-selected sample list to Congress of 175 of the "therapeutic" reasons he had performed partial-birth abortions, right through the ninth month. That list contained 39 abortions for "maternal depression" and 9 abortions because the baby had a cleft palate. Other

abortions were performed because of "agoraphobia" (the fear of going outside), high blood pressure, diabetes, and because of "pediatric indications" (meaning that the girls were under 18 years old).

Though pro-choice groups continue to claim that this method of abortion is done only in rare, tragic circumstances, there have been defections from their ranks. Most notably, Ron Fitzsimmons, a leading abortion industry lobbyist who represents approximately 200 abortion clinics, has admitted that he "lied" when he claimed on national television during a previous debate on this subject that partial-birth abortions are performed only on women whose lives are endangered or whose unborn children are severely disabled. As Mr. Fitzsimmons told the New York Times, "in the majority of cases, the procedure is performed on a healthy mother with a healthy fetus that is 20 or more weeks along." Going by the statements of abortionists themselves, 90 percent of partial-birth abortions are done on healthy women with healthy babies. Though we do not know how many of these abortions are done each year, and though even 1 is too many, we know that many more are performed annually than the 600 originally claimed by our pro-choice colleagues. An extensive investigative report by the Sunday Record (9/15/96) in Bergen County, New Jersey, found that "Interviews with physicians who use the method reveal that in New Jersey alone, at least 1,500 partial-birth abortions are performed each year." That same article reported that "Another [New York] metropolitan area doctor who works outside New Jersey said he does about 260 post-20-week abortions a year, of which half are by intact D&E [a euphemism for partial-birth abortion]. The doctor, who is also a professor at two prestigious teaching hospitals, said he had been teaching intact D&E abortions since 1981, and he said he knows of two former students on Long Island and two in New York City who use the procedure."

Despite the evidence to the contrary, some Senators insist that partial-birth abortions are sometimes necessary to protect a woman's life or health, and they have particularly emphasized the claim that they are necessary and justified in some cases when the baby has severe medical problems. In their arguments, they have mentioned several severe disabilities, and suggested that it is a loving decision to destroy a child with those conditions rather than to give that child help and a chance at life. One of their supporters, the feminist Betty Friedan, used harsher language: in a television debate she twice referred to those babies as "monsters." Are people with the same disabilities who are born, and live, "monsters"? We reject that any child, any human being, born or unborn, is a "monster." Every child, born or unborn, is a gift from God to be cherished and protected.

For each one of the conditions our colleagues have cited as being a reason for performing a partial-birth abortion on life or health grounds, we have been given expert testimony from neonatologists and even from abortionists that those babies do not need to be destroyed to protect the life or health of their mothers. We have been told that it is sometimes necessary to separate the child from the mother, but not to kill the child. For many babies, chances of survival will be slim to none, but why not let a child die peacefully, with medical care to prevent suffering, instead of brutally killing that child? Our colleagues tell us that last year the American College of Obstetricians and Gynecologists (ACOG) wrote in opposition to this bill because a partial-birth abortion "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of the woman." That opposition, though, was not based on any medical evidence that it ever has been or ever will be the "best" or "most appropriate" procedure in any circumstance. In fact, in its letter of opposition ACOG admitted that it knew of no such circumstance, and since it took its radical, inhuman position last year, it has not been able to offer a shred of evidence that any such mythical circumstance has ever or could ever exist. Its silence has been deafening.

Our colleagues have cited a couple of cases in which women were told that they had to have late-term abortions in order to protect their lives and health. Their unborn children had severe fetal abnormalities. The abortions, as those women described them, were not partial-birth abortions, but that fact does not make us doubt that similar women in similar circumstances have been told that they should have partial-birth abortions. We know of one such woman, Lori Watts, whose baby had the same severe abnormality, occipital meningo-encephalocele (in which part of the brain develops outside the skull), as Vicki Wilson's baby (Vicki Wilson is one of the women our colleagues have said had an abortion on doctors' advice). When Lori Watts was 7 months pregnant, a sonogram revealed her baby had hydrocephaly (the other problem of the brain developing outside of the skull, as well as a host of other abnormalities, were diagnosed later). Her obstetrician then referred her to a clinic for genetics counseling, and was told by a counselor there that she should have a partial-birth abortion, and he described the procedure. Lori Watts and her husband Donny were horrified and outraged. They confronted their obstetrician, who said that the clinic had some counselors who recommended other options, and he thought that they would get one of them. He then said that it would be too difficult for him to deliver their baby, and said they would have to find another obstetrician. The Watts then went to four different hospitals in an effort to find one willing to deliver their baby. Those hospitals refused, recommending instead an abortion, which they would do, and said that their baby would not survive and would be a "burden, a heartache, a sorrow." The Watts refused to take this expert, "caring" advice. Finally, the University of Maryland Hospital agreed to deliver their baby. Donna Joy Watts was born on November 26, 1991. For 3 days after she was born, despite pleading from her parents, doctors refused to drain the fluid from her brain and would not give her nourishment. They insisted on calling this baby who was already born a "fetus" and said she would not live. Finally, the doctors relented and drained the fluid, and Donna Joy's parents came up with a way of feeding her with a sterilized eyedropper (she was born with only 30 percent of her brain and did not have a functioning medulla oblongata, which she needed to eat normally). It took an hour and a half to feed their daughter, after which they would take an hour-and-a-half break; they kept up this 3-hour schedule 24 hours per day for several months. Donna Joy had other problems as well, including epilepsy, a sleep disorder, continuing

SEPTEMBER 18, 1998

VOTE NO. 277

digestive complications, and apnea. Still, she grew, and, remarkably, began to learn and use sign language. She suffered a severe setback at 18 months when she contracted encephalitis and lost her memory, but she again started making remarkable progress. She took her first steps just before she turned 2 years old. By 4 ½ years of age, she could speak, walk, and handle objects fairly well. Now, at age 6, she is a very happy, normal, vivacious child. She still has many disabilities, but she has her whole life ahead of her.

Before Donna Joy Watts was born, obstetricians, genetics counselors, and 4 hospitals all said that it would be in her best interest if she were killed by a partial-birth abortion. They said that her mother's life and health were threatened, and that she had no chance to live. Even after she was born doctors were saying that it was in her best interest if she were denied medical treatment and starved to death. For those doctors and hospitals, killing Donna Joy would have been much easier than helping her and her mother through a high-risk pregnancy. We do not doubt that many parents are confronted by doctors who tell them, falsely, that their only option is partial-birth abortion. We do not doubt that many parents believe that lie.

Brenda Shafer is a nurse who witnessed a partial-birth abortion performed by Dr. Haskell, which she described as follows: "I am a registered nurse with 13 years of experience. But one day in September 1993 my nursing agency assigned me to work at a Dayton, Ohio, abortion clinic, and I had often expressed strong pro-choice views to my two teenage daughters. So I thought this assignment would be no problem for me. I was wrong. I stood at a doctor's side (Dr. Haskell) as he performed the partial-birth abortion procedure--and what I saw is branded forever in my mind. The mother was 6 months pregnant. The baby's heartbeat was clearly visible on the ultrasound screen. The doctor went in with forceps and grabbed the legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms--everything but the head. The doctor kept the baby's head just inside the uterus. The baby's little fingers were clasping and unclasping, and his feet were kicking. then the doctor stuck the scissors through the back of his head, and the baby's arms jerked out in a flinch, a startle reaction, like a baby does when he thinks that he might fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening and sucked the baby's brains out. Now the baby was completely limp. I never went back to that clinic. But I am still haunted by the face of that little boy--it was the most perfect, angelic face I have ever seen." We urge our colleagues, both pro-life and pro-choice, to join us in voting the Clinton veto.

Argument 2:

We have always been pro-choice, and we do not expect ever to change our position. Women are going to seek abortions whether they are legal or not. When the issue of partial-birth abortions first came before the Senate, we found the procedure to be shocking, but we also heard conflicting testimony on the frequency with which it was used and the necessity for its use to protect the life or health of the mother. Over time, we gradually came to realize that the claims in favor of the procedure were false. Whenever a Senator changes his or her position on an issue, especially on an emotional issue like abortion, he or she had better be ready to be accused of "flip-flopping" and of not having any real convictions. We have nothing to gain politically from voting to override President Clinton's veto; we are going to be attacked. However, on principle, we have come to the conclusion that partial-birth abortions should be banned, and we will therefore vote for final passage, no matter the political costs.

Those opposing final passage contended:

Late-term abortions are physically difficult and emotionally devastating to the women involved. These abortions are of wanted babies; women do not casually carry children through most of their pregnancies and then decide to abort them for trivial reasons. They take place under the most tragic of circumstances, when something has gone wrong. When a late-term abortion is necessary, the decision of the proper procedure to use should be left to the woman and her doctor. The Constitution requires no less. The Supreme Court has ruled that post-viability abortions can be restricted, but, if they are, an exception must be made to protect the life and the health of the woman.

We have heard a lot of expert opinions both for and against this bill, but the significance of that testimony pales before the testimony that has been given by two women who had so-called "partial-birth" abortions. The riveting accounts of these women who courageously were willing to make their cases public brought the needed human dimension to this debate. This debate is about real women, and real families, in desperate circumstances. One of the women who had this procedure is Coreen Costello. She is married and the mother of two children, and is a self-described pro-life Republican. When she was 7-months pregnant with her third child, she was told that her child had a lethal neurological disorder, had been unable to move for 2 months, and was not expected to live. In her words: "I considered a Caesarean section, but experts at Cedars-Sinai Hospital were adamant that the risks to my health and possibly my life were too great. There was no reason to risk leaving my children motherless if there was no hope of saving Katherine. The doctors all agreed that our only option was the intact D&E procedure. I was devastated. The thought of an abortion sent chills down my spine. I remember patting my tummy, promising my little girl that I would never let anyone hurt or devalue her. After Dr. McMahon explained the procedure to us, I was so comforted. He and his staff understood the pain and anguish we were feeling. I realized I was in the right place. This was the safest way for me to deliver. This left open the possibility of more children, it greatly lowered the risk of my death, and most important to me, it offered a peaceful, painless passing for Katherine Grace. When I was put under anesthesia, Katherine's heart stopped. She was able to pass away peacefully inside my womb, which was the most comfortable place for her to be. Even if regular birth or a Caesarean had been medically possible, my daughter would have died an

agonizing death. When I awoke a few hours later, she was brought in to us. She was beautiful. She was not missing any part of her brain. She had not been stabbed in the head with scissors. She looked peaceful. My husband and I held her tight and sobbed. We stayed with her for hours, praying and singing lullabies. Giving her back was the hardest moment of my life."

The other woman who had this procedure who testified is Vicki Wilson. She and her husband were excitedly awaiting the birth of their third child when they found out at 36 weeks of pregnancy that approximately two-thirds of their baby's brain had formed outside of her skull. They were told that there was no way her daughter would survive outside of her womb, and that having a Caesarean-section would be too dangerous for Viki. In Viki's words: "The biggest question for me and my husband was not 'Is she going to die?' A higher power had already decided that for us. The question now was 'How is she going to die?' We wanted to help her leave this world as painlessly and peacefully as possible, and in a way that protected my life and health and allowed us to try again to have children. We agonized over these options, and kept praying for a miracle. After discussing our situation extensively, our doctors referred us to Dr. McMahon. It was during our drive to Los Angeles that we chose our daughter's name. We named her Abigail, the name my maternal grandmother had always wanted for a grandchild. We decided that if she were named Abigail, her great-grandma would be able to recognize her in heaven. My husband grilled Dr. McMahon with all the same questions that many of you probably have asked about the procedure. We would never have let anything happen to our baby that was cruel, or unnecessary; and Bill as my husband, loving me, wanted to be sure it was safe for me. Dr. McMahon and this procedure were our salvation. My daughter died with dignity inside my womb. She was not stabbed in the back of the head with scissors, no one dragged her out half alive and then killed her, we would never have allowed that to happen." When Senators consider this bill, and weigh the medical and legal testimony, we urge them to never lose sight of the fact that if this bill were law when Dr. McMahon helped Viki Wilson and Coreen Costello, he would have faced up to 2 years in prison.

This bill is not about just one medical procedure, as our colleagues claim; it is about chipping away at the right to choose. Certain Senators are constantly trying to restrict the constitutional right to an abortion and they have often succeeded. For instance, they have taken that right from poor women and prisoners by denying public funding and they have taken away that right as a health care option for Federal employees. Some of our colleagues say we are being extreme, in the same way that the National Rifle Association is extreme in opposing reasonable restrictions on firearms, but we see a clear pattern in our colleagues' efforts. We must draw the line everywhere, or the right to an abortion will become an empty right.

Another problem with this bill is that it is clearly unconstitutional. In 1976, the Supreme Court ruled in *Planned Parenthood v. Danforth* that a specific form of abortions (saline) could not be banned after the 12th week. Nineteen years later, Congress is considering a specific ban on another form of abortion. We have heard conflicting testimony on the constitutionality of this bill. We agree with the arguments that say the bill is unconstitutional, but we think the broader point is that the testimony at least demonstrates that this bill is constitutionally questionable.

Similarly, the medical testimony we have heard is conflicting. Some abortion providers have testified that in some cases this procedure is necessary for the life or health of the woman, and that it is also the safest procedure to be used. Other doctors have sharply disputed those claims. In our opinion, this dispute is a medical dispute that each doctor should resolve for him- or herself, without congressional interference. If a particular doctor in his medical judgment thinks that it is the best method, he should be allowed to use it.

Overall, we are more convinced than ever that the decision to have a late-term abortion is a highly personal one that should be left to the woman, and the safest and most appropriate forms of abortion should be determined by medical professionals, not Senators. We urge Senators not to practice medicine without a license. We urge them to vote against this veto override attempt.